IN THE SUPREME COURT OF IOWA

Supreme Court No. 15-1373
Johnson County Case No. EQCV075292
Johnson County Case No. CVCV075457

TSB HOLDINGS, L.L.C. and
911 N. GOVERNOR, L.L.C.,
Plaintiffs-Appellants,

vs.

CITY OF IOWA CITY, IOWA
Defendants-Appellee.

APPEAL FROM THE DISTRICT COURT OF JOHNSON COUNTY
HONORABLE JUDGE MITCHELL E. TURNER

APPELLANTS' REPLY BRIEF

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ARGUMENT

As shown in both Appellants' ("TSB") and Appellee's ("the City") briefs, the underlying facts are not seriously disputed. TSB asserts, however, that both the trial court and the City misconstrue the nature of TSB's challenge to the downzoning of its property ("the Property").[1] TSB also contends it met the minimal notice pleading standards concerning its takings claim.

I. BOTH THE CITY AND THE TRIAL COURT MISCONSTRUE TSB'S CHALLENGE TO THE 2013 DOWNZONING OF THE PROPERTY.

TSB respectfully suggests that both the City and the trial court misconstrue TSB's challenge to the 2013 downzoning of the Property. This case is not about a challenge to the City's power to rezone property. Nowhere in its Petitions did TSB seek to permanently enjoin the City from ever rezoning the property.[2] The language of the Remand Order itself contemplates the possible rezoning of the Property. (App. at p. 69). ("... [f]urther development or redevelopment ... shall be subject to the zoning ordinances in effect at the

[1] TSB's references to the record and parties are the same herein as used in its Proof Brief (e.g., "the Remand Order," "TSB," "the City").

[2] While TSB's Petition in EQCV075292, filed before the effective date of the 2013 rezoning, sought declaratory relief that the City may not rezone the Property inconsistent with Kempf and a temporary injunction preventing the City from doing so, see App. at p. 137, the Property was rezoned effective March 28, 2013, and any request for injunctive relief was withdrawn.

time such further development or redevelopment is undertaken ..."). This case is about a city's knowing and intentional violation of an injunction prohibiting it from interfering with construction of apartment buildings on the Property. Id. ("... The City is and shall be enjoined from interfering with development of those properties as herein provided [apartment buildings] ..."). The fact that the interference comes in the form of a zoning ordinance, passed pursuant to the City's police power, does not magically legitimize an otherwise illegal action. Actions taken in violation of an injunction are invalid. See Northwestern Mut. Life Ass. v. Hahn, 713 N.W.2d 709, 712 (Iowa Ct. App. 2006) (holding that change in beneficiary designation form made in violation of a temporary injunction should be set aside).

There is no question that the City's sole purpose for rezoning the Property was to prevent construction of apartment buildings as allowed by Kempf and there is also no question that the rezoning of the Property accomplished this purpose. The record below undisputedly shows the following: (1) on January 23, 2013, prior to the rezoning, TSB submitted a site plan to the City to develop the Property consistent with Kempf . (App. at p.128-130). (2) the City was aware prior to the rezoning of the Property that TSB sought to develop the Property consistent with Kempf (See Return of Writ in CVCV075457 at pp. 49, 50) (Barkalow statements before council at the

February 5, 2013 public hearing on rezoning the Property)); (3) the City's council knew prior to rezoning the Property that its zoning department denied TSB's site plan based on the proposed rezoning of the Property[3] (App. at pp. 136-37). (4) the purpose of the rezoning was to prohibit construction of apartment buildings (See Return of Writ in CVCV075457 at pp. 26, 46, 47); (5) the Property was rezoned effective March 28, 2013 (App. at p. 20); (6) when TSB followed the City's administrative process to appeal the denial of its site plan, the City's Board of Adjustment ("BOA") denied TSB's appeal based on the rezoning of the Property (App. at 131-133). The issue is whether the City's 2013 downzoning, passed expressly to stop construction of apartments and used to do so, violates the injunction prohibiting the City from interfering with development. TSB respectfully suggests that it does. Appellant's Brief at pp. 17, 18 (discussing injunctions).

The City has argued throughout this action, and the trial court agreed, that the BOA's actions in denying TSB's site plan are irrelevant in evaluating the legality of the rezoning. (App. at 181 ; Appellee's Brief at pp. 20-21). The City contends that TSB's true complaint lies with the BOA for denying its site plan. Id. While it is true that TSB has a certiorari action pending against the

[3] As stated in TSB's prior Brief under City ordinances, the setting of a public hearing on rezoning prohibits approval of the site plan or issuance of a building permit unless construction complies with the proposed rezoning.

City's BOA challenging the denial of its site plan based on Kempf, TSB Holdings, L.L.C. and 911 N. Governor, LLC v. Iowa City Board of Adjustment, Johnson County Case No. CVCV076128, it is important to remember that the BOA denied TSB's site plan based solely on the legislative acts of the City. (App. at pp. 132-133). In fact, in the BOA case, the City argued to the BOA that it had no choice but to follow the zoning ordinances passed by the City and that it did not have authority to determine whether Kempf governed development of the Property. (App. at pp. 24-66). The BOA agreed. Plaintiffs' (App. at pp. 132-133) (BOA Ruling: "[T]he Board finds that the decision as to whether a court order issued in 1985 preserved the right of the property owner to develop the properties according to R3B zoning is not within the authority of the Board of Adjustment as the rezoning was a legislative action of the City Council ... The regulation specialist is subject to the legislative actions of city council including the moratorium and rezoning of the subject property ..."). If the BOA has no choice but to follow the legislative act of the City, see Boomhower v. Cerro Gordo County Bd. of Adjustment, 163 N.W.2d 75, 77 (Iowa 1968) (holding that a board of adjustment lacks authority to entertain challenges to zoning classifications), the court hearing the appeal thereof may be similarly limited. See Iowa Code Section 414.18 (addressing

the court's authority in certiorari actions related to appeals from a board of adjustment).

What the City and the trial court suggest seems hard to believe. The ultimate conclusion of their logic is that the undisputed and intended impact of the 2013 downzoning on the Property (the denial of TSB's site plan to construct the apartment buildings allowed under Kempf) is irrelevant to determining whether the 2013 rezoning is illegal. TSB concedes that if this Court determines that the BOA's denial of TSB's site plan based on the rezoning is irrelevant to determining whether the rezoning is legal, TSB loses. It is undisputed, however, that the root cause of the BOA's denial of TSB's site plan uses the 2013 rezoning. It is also undisputed that TSB's site plan was denied by a city zoning official because of the 2013 rezoning before the BOA was involved. (App. at p. 129). The rezoning should be invalidated notwithstanding the City's claim that to do so constitutes "rezoning from the bench." Appellee's Brief at p. 19. If the 2013 rezoning is invalidated, the zoning remains unchanged, unaffected by the illegal act. See Herman v. City of Des Moines, 250 Iowa 1281, 97 N.W.2d 893, 898 (1959) (property illegally spot zoned retained original classification).[4] If invalidating a zoning

[4] The zoning classifications in existence prior to the illegal act are found in the staff reports related to the rezoning.

ordinance constitutes "rezoning from the bench" as the City suggests, it is difficult to imagine how the legality of any rezoning ordinance could ever been tested. TSB respectfully suggests these undisputed facts entitle it to a Writ of Certiorari invaliding the 2013 rezoning of the Property.

II. TSB PROPERLY RAISED A TAKINGS CLAIM.

The City appears to attack TSB's takings claim on two separate but related grounds. First, the City argues that TSB failed to preserve error on the dismissal of its takings claim because, according to the City, a takings claim was never "properly presented" to the district court until TSB filed its June 15, 2015 Motion to Enlarge pursuant to Iowa R. Civ. P. 1.904(2). Second, the BOA contends that TSB's takings claim did not meet notice pleading requirements for a variety of reasons. Appellee's Brief at pp. 22-26. TSB addresses these arguments separately.

A. TSB PRESERVED ERROR WITH RESPECT TO ITS TAKINGS CLAIM

While TSB does not understand what the City means by the term "properly presented," if the City is attempting to argue that the first time TSB drew its takings claim to the trial court's attention was in its 1.904(2) Motion, the City is incorrect. Paragraph 10 of TSB's Petition in CVCV075457 alleges that the imposition of the 2013 zoning ordinance would constitute an

unconstitutional taking of TSB's property. (App. at p. 162). The issue of TSB's takings claim appeared throughout the briefing before the trial court granted the City's Motion for Summary Judgment. See Pls' Brief in Support of Summary Judgment at p. 8 ("TSB's certiorari action alleges that the City's actions constitute a taking in the event TSB cannot develop the property ..."); Pls' August 23, 2014 Brief at 1. The City maintained that TSB had not brought a takings claim related to the 2013 downzoning. See Def's Brief in Support of Res. to Pls' Motion for S. J. at p. 1, 3 n. 1. and August 15 Brief at 3. The dispute about TSB's takings claim spilled over into the March 20, 2015 hearing on both parties' Motions for Summary Judgment. (App at p. 201) ([Counsel for TSB]: "We're going to have a trial on the takings claim, no matter what, even if the City's motion is granted ..."); (App. at p. 208) ([Counsel for TSB]: "... I don't know if that's the case your honor because you would still have -- if you still had the takings claim ... if you prevail on takings claim, then that kind of moots out all the BOA stuff ..."); (App. at p. 213) ([Counsel for the City]: "We disagree that they have actually alleged a takings claim ..."); (App. at p. 215). If the City is suggesting that TSB should have specifically stated in its briefs or at the Summary Judgment hearing that its Petition "met notice pleading requirements" as opposed to what it did brief and say, and that the failure to use the specific language "met notice pleading requirements" or point out

certain documents to the trial court which were already part of the record[5] prior to its ruling on the City's and TSB's Motions for Summary Judgment somehow leads to the failure to preserve error, TSB suggests that the City seeks to hold TSB to an extremely high pleading standard. The trial court itself originally acknowledged TSB's contention that the imposition of the 2013 ordinance would result in an unconstitutional taking. (App. at p. 170-171). ("...[P]laintiffs contend that the change in zoning classification...would result in an unconstitutional taking of plaintiff's [sic] property..."). The trial court then adopted its relief language from the City's proposed ruling, tr. p. 33, 34 (proposed rulings) which contained a global dismissal of TSB's lawsuit without specifically addressing the takings claim it previously acknowledged. (App. at p. 181). ("...**[I]T IS THEREFORE FURTHER ORDERED** that Defendant's Motion for Summary Judgment on all claims pled in the above-captioned EQCV075292 and CVCV075457 is **GRANTED**...[emphasis in original]"). The takings issue was properly before the trial court and its failure to specifically address the takings claim led TSB to seek clarification of

[5] Exhibit A attached to TSB's July 1, 2015 Reply in support of its Motion to Enlarge contained a number of documents already before the trial court prior to its June 3, 2015 Ruling on the Motions for Summary Judgment.. The September 19, 2012 Holland letter was attached to the City's Summary Judgment supporting material. The remaining documents appear in the Return of Writ in CVCV075457.

the trial court's June 3, 2015 ruling. Only in its July 14, 2015 Ruling did the trial court state that TSB's Petition failed to meet notice pleading requirements because TSB "did not clearly state any separate takings claim or claim for damages." (App. at p. 184).[6] Significantly, the trial court itself never ruled that TSB's arguments related to its takings claim were raised in a tardy fashion. Since the takings claim was always properly before the trial court the pending case is different from Spaulding v. Schuerer et. al., 847 N.W.2d 614 (Iowa Ct. App. 2014 (table)), cited by the City. In Spaulding the Court held that a party could not raise a theory for recovery for the first time through a Rule 1.904 Motion to Enlarge. Id. The Spaulding plaintiff attempted to raise a new theory of recovery not previously mentioned in the pleadings of the case. The case at bar is distinguishable. Since TSB drew the trial court's attention to its takings claim before it granted summary judgment, American Family Mut. Ins. Co v. Allied Insurance, 562 N.W.2d 159 (Iowa 1997) is on point. And since the trial court essentially handled TSB's takings claim like a Motion to Dismiss,

[6] Had TSB not filed its Motion to Enlarge and merely appealed the trial court's June 3, 2015 ruling, the City most likely would have argued that the failure to seek clarification of the basis for the dismissal of its takings claim constituted a waiver of the right to appeal its dismissal. See Meier v. Senecaut, 641 N.W.2d 532, 537 (Iowa 2002) (When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal.").

the statements from Lee v. State, 844 N.W.2d 668 (Iowa 2014) (discussing permissible relief under a general prayer for equitable relief) apply with equal force. Appellant's Brief at pp. 22-26.

B. TSB'S PETITION MET NOTICE PLEADING STANDARDS AS IT PUT THE CITY ON NOTICE OF THE INCIDENT GIVING RISE TO THE CLAIM AND ITS GENERAL NATURE

The notice pleading standards were set forth in TSB's Proof Brief along with the reasons why TSB asserts it met the minimal notice pleading standards for alleging a takings claim. TSB briefly addresses the arguments made in the City's Brief as to why TSB's Petition is deficient.

TSB readily admits to many of the points the City makes in its Brief. TSB's Petition did not specifically pray for damages resulting from what it believed to be a taking. TSB's Petition does not reference the United States or Iowa constitutions nor does it use the terms "damages" or "diminution in value."[7] These admitted "failures," however, do not mean that the City did not have notice of the facts giving rise to such a claim and the general nature thereof. If a pleader need not even identify specific legal theories in a petition

[7] TSB does dispute the City's allegation in its Brief that the first time TSB raised the issue of damages in the litigation was in its Motion to Enlarge. The documents cited in TSB's Brief to prove the City had knowledge of the facts giving rise to a takings claim and its general nature appear in Writs on file with the Court, were in the possession of the City before TSB filed any litigation and were part of the record before the trial court.

to meet notice pleading requirements, see Cemen Tech. v. Three D. Indus., LLC, 753 N.W.2d 1, 12 (Iowa 2008) (citation omitted), the failure to mention the constitutions or use the magic words "damages" or "diminution in value" should not be fatal. A pleading is sufficient if it apprises of the incident out of which a claim arises and the mere general nature of the action. Rieff v. Evans, 630 N.W.2d 278, 292 (Iowa 2001). The primary purpose of pleading rules is to provide notice and facilitate a fair and just decision on the merits of a case. Estate of Kuhns v. Marco, 620 N.W.2d 488, 491 (Iowa 2000). Pleading rules do not exist to allow a mistake in the pleading to determine the outcome of a case. Id. (citing Conley v. Gibson, 355 U.S. 41, 48 (1957) (relation back case). Jack v. P and A Farms, Ltd., 822 N.W.2d 511, 519 (Iowa 2012) (stating that the policy of the jurisdiction is to allow a determination of controversies on the merits). The City has never denied it had knowledge of the incident giving rise to a takings claim or its general nature; instead the City attacks the way TSB pled the claim.

The City contends that the only "truly litigated" issues by the parties was the legitimacy of the 2013 rezoning and not any alleged taking. Appellee's Brief at 24. The City supports this argument by claiming that TSB itself moved for "summary judgment" and not "partial summary judgment" and even quotes from TSB's Motion for Summary Judgment to argue that TSB

itself took the position that the case could be resolved on summary judgment. Id. This argument ignores the references to a takings claim and TSB's assertion at the summary judgment hearing that even if the City prevailed on its Motion for Summary Judgment that TSB's takings claim remained. (App. a pp. 201; 208). The City points out that TSB's summary judgment brief contains no legal argument regarding a takings claim. Appellee's Brief at p. 24. This is absolutely true. Whether a taking has occurred is a fact-sensitive inquiry requiring examination of a zoning decision's impact and the extent to which it interferes with investment-backed expectations. Iowa Coal Mining Co., Inc. v. Monroe County, 555 N.W.2d 418, 432 (Iowa 1996) (citations omitted). A takings claim can never be adjudicated on summary judgment. More significantly, however, if TSB successfully invalidates the 2013 zoning ordinance, TSB's takings claim became moot and no trial thereon would be necessary. As TSB pointed out at the hearing on the Motions for Summary Judgment, the only issue upon which TSB focused was the validity of the 2013 rezoning based on the ruling in Kempf.[8] (App. at 201). And the City's

[8] The City also argues that TSB's reference to a taking applied only to an allegation of illegality related to the imposition of the 2013 zoning. Appellee's Brief at 23 ("...[W]hile a "taking" was included in a list of reasons for the illegality of the rezoning, no other aspects of the declaratory judgment or certiorari petition suggested a takings claim..." Takings, however, are not illegal. They require the payment of just compensation should a taking occur.

reference to the alleged recognition by the trial court's comments in an October 14, 2014 ruling about the parties agreeing to continue the original trial date so the trial court could determine "whether the matter could be disposed of on summary judgment" does not aid the City. The Court's comments were made in the context of TSB attempting to amend its Petition to request declaratory relief concerning the applicability of Kempf to the Property generally. Pls' Proposed Amended Petition . TSB did not attempt to amend the takings allegation in its Petition. TSB suggests that it would never enter into any "agreement" which would prejudice its right to seek just compensation in the event the City's 2013 zoning ordinance was held to be valid. Even if the City's enactment of Ordinance No. 13-4518 was a valid exercise of the police power as determined by this Court, it may nevertheless result in a taking entitling TSB to compensation. See Hunziker v. State, 519 N.W.2d 367, 372 (Iowa 1994) (Snell, J. dissenting); Fitzgarrald v. City of Iowa City, 492 N.W.2d 659, 665 (Iowa 1992) (stating that the frustration of investment-backed expectation by zoning ordinance may constitute a taking for which compensation is due).

TSB's Petitions meet the minimal notice pleading requirements concerning its takings claim. The allegations in TSB's Petition make reference to the events giving rise to a possible claim (the rezoning of the Property) and the

general nature of the action (a taking). The City has never claimed otherwise. The remedy for a taking is damages, a fact with which the City is familiar. The failure to specifically request damages, the failure to mention various constitutions or the failure to move for summary judgment on the takings claim (which could never be granted) does not change the analysis. The trial court's first ruling mentioned the takings claim but adopted the City's proposed dismissal of "all claims pled" language. The trial court's ruling on TSB's Motion to Enlarge seemed like an after-thought. The trial court's ruling on TSB's takings claim should be reversed.

SUMMARY

The City's actions in rezoning the Property are a violation of the injunction set forth in Kempf and the Remand Order as a matter of law. The trial court's granting of Summary Judgment to the City should be reversed and Summary Judgment granted to TSB declaring the City's rezoning ordinance 13-4513 invalid.

TSB's Petition meets the minimal requirements of notice pleading. The trial court's dismissal of TSB's takings claim should be reversed.

CONCLUSION

TSB asks that this Court reverse the trial court's granting of the City's Motion for Summary Judgment and the trial court's denial of TSB's Motion for

Summary Judgment and invalidate ordinance 13-4518. TSB also asks that this Court reverse the trial court's dismissal of its takings claim and remand this action for trial thereon in the event the City's Motion for Summary Judgment is allowed to stand.

Respectfully submitted,

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ATTORNEY'S COST CERTIFICATE

I certify that the actual cost of reproducing the necessary copies of Plaintiff-Appellant's Proof Brief consisting of 19 pages was in the sum of $0.00.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 3,557 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa. R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in size 14 Font Cambria.

Dated this 8th day of February, 2016.

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PROOF OF SERVICE AND CERTIFICATE OF FILING

I, Charles A. Meardon, certify that on February 8, 2016, I served this document by filing an electronic copy of this document with the Electronic Document Management System to all registered filers for this case. A review of the filers in this matter indicates that all necessary parties have been and will be served in full compliance with the provisions of the Rules of Appellate Procedure.

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